IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 3.7.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

T.C.(A).Nos.264, 301 and 431 of 2004

Commissioner of Income Tax - II
Coimbatore. .. Appellant in/ Respondent all T.Cs.

Vs.

M/s.Salzer Electronics Ltd.
Coimbatore. .. Respondent in/ Appellant all T.Cs.

Appeal under Section 260A of the Income Tax Act, 1961 against the orders of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 13.11.2003 and 13.1.2004 in ITA Nos.308/Mds/1996 and 2355 and 2356/Mds/1996 for the assessment years 1993-94 and 1994-95 against the order of the Commissioner of Income Tax (Appeals) Coimbatore for the Assessment year of 1993-94- 1994-95 in ITA.No.47 - C and 48-C/ 96-97 351-C/95-96 dated 10.9.96, 16.1.96 and against the Assessment order of the Deputy Commissioner of Income tax Special Range II Coimbatore in PAN GIR No.CX2279 dated 12.2.96, 30.11.94 respectively.

For Appellant : Mrs.Pushya Sitaraman, Sr.S.C.(IT)

For Respondent : Mr.T.N.Seetharaman

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(Delivered by P.D. DINAKARAN, J.)

The vexed substantial question of law, as raised by the Revenue, arises for consideration in these appeals is,

" Whether on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was right in holding that for computation of profit under Section 80 HHC, business profit should be adopted without taking into account unabsorbed depreciation carried forward from the earlier year ?"

under the following facts and circumstances of the case.

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2.1. The assessment years involved in these appeals are 1993-94 and 1994-95. The assessing officer, while processing the return of income filed by the assessee for the assessment year 1994-95 under Section 143(1)(a), worked out the deduction under Section 80HHC of the Income-tax Act, 1961 (in brevity 'the Act'), after deducting unabsorbed depreciation carried forward from the earlier year, by his assessment order dated 30.3.95. Aggrieved by the same, the assessee went on appeal before the Commissioner of Income-tax (Appeals), who, by order dated 16.1.96, following the earlier order in the assessee's own case, held that the deduction under Section 80HHC has to be computed after setting off of carried forward unabsorbed depreciation and that such an adjustment was possible under Section 143(1). But, on further appeal by the assessee, the Income-tax Appellate Tribunal, by its order dated 13.11.2003, following the decision of the Bombay High Court in the case of Commissioner of Income-tax v. Shirke Construction Equipment Ltd. [246 I.T.R. 429], allowed the claim of the assessee. Against the said order of the Tribunal, the Revenue has come forward with T.C.(A) No.431 of 2004.

2.2. The Assessing Officer, while completing the assessments for the assessment years 1993-94 and 1994-95, disallowed the claim of the assessee with regard to deduction under Section 80HHC before setting off of unabsorbed depreciation and computed the deduction after adjusting the unabsorbed depreciation brought forward by assessment orders dated 12.2.96. The said orders of the Assessing Officer were confirmed by the Commissioner by common order dated 10.9.96, on appeals at the instance of the assessee. But, the Tribunal by its common order dated 13.1.2004 in the appeals filed by the assessee, reversed the order of the Commissioner following the decision of the Bombay High Court in Commissioner of Income-tax v. Shirke Construction Equipment Ltd. [246 I.T.R. 429]. Against the said order of the Tribunal, the Revenue has filed T.C.(A) Nos.264 and 301 of 2004.

3. Heard both sides.

4.1. When an identical issue came up for consideration before this Court in Asvini Cold Storage P. Ltd. v. Commissioner of Income-tax [(2007) 290 I.T.R. 183], a Division Bench of this Court, while rejecting the case of the assessee therein, who placed reliance on the decision of the Bombay High Court in Commissioner of Income-tax v. Shirke Construction Equipments Ltd. [(2000) 246 I.T.R. 429 (Bom.)], followed the decision of the Apex Court in IPCA Laboratory Ltd. v. Deputy Commissioner of Income-tax [(2004) 266 I.T.R. 521 (SC)], and held as hereunder:-

> " ... Section 80 HHC of the Income-tax Act, 1961, provides for deduction of profits from the gross total income. Sub-section (3) is a machinery provision which lays down the manner of circulating the profits which constitute deduction under section 80 HHC(1).

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Consequently, section 80 HHC(3) aids in the working of the deduction under section 80 HHC(1). Considering the fact that section 80HHC is a section which comes under Chapter VI-A providing for special deduction in gross total income, necessarily, the computation for deduction has to be in accordance with the total income computed in a manner provided fro under section 80AB. It is relevant to note that section 80A deals with deduction to be made under Chapter VI-A in computing the total income. It may also be noted that section 80A(2) lays down that the aggregate amount of the income under Chapter VI-A shall not exceed the gross total income of the assessee. Read in the context of section 80A and section 80AB, the scheme of deduction under section 80HHC has to be computed out of the income from profits and gains of business in accordance with the provisions of the Act, as stated so under section 80AB.

... Section 80AB starts with the words "Where any deduction is required to be made or allowed under any section included in this Chapter, ... notwithstanding anything contained in that section, for the purpose of computing the deduction under that section, the amount of income of that nature as computed in accordance with the provisions of this Act, (before making any deduction under this Chapter), shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income". It may be seen that the provisions of section 80AB contemplate that the gross total income has first to be computed in accordance with the provisions of the Act. When it comes to a deduction, section 80AB further provides that for the purpose of deduction under any of the sections in Chapter VI-A, the amount of income of that nature has to be computed in accordance with the provisions of the Act, which means, necessarily for the purpose of deduction, the income of that nature computed for deduction must have a working in accordance with the provisions of this Act. If that be so, income from profits and gains of business must necessarily conform to the provisions in Part D, including set off and carry forward."

4.2. While holding as above, the Division Bench in the above case held that the unabsorbed depreciation and unabsorbed investment allowance of earlier years should be set off while computing the profits of business for the purpose of determining the relief under section 80 HHC.

4.3. The view taken by this Court in the case of Asvini Cold Storage, referred supra, was subsequently followed by this Court in an unreported case in T.C.No.62 of 2004 (between Commissioner of

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Income Tax-III v. M/s.Sharon Vaneers P. Ltd.), wherein this Court by order dated 26.2.2007 held as follows:-

> 6. It is not in dispute that section 80HHC of the Act, which provides for deduction in respect of profits retained for export business, has been incorporated in the Income-tax Act, 1961, with a view to providing incentive for earning foreign exchange. A plain reading of section 80HHC makes it clear that in arriving at profits earned from export of both self manufactured goods and trading goods, the profits and losses in both trades have to be taken into consideration. If, after such adjustments, there is a positive profit the assessee would be entitled to deduction under section 80HHC(1) of the Act and if there is a loss the assessee would not be entitled to deduction. In arriving at the figure of positive profit, both the profits and the losses will have to be considered. If the net figure is a positive profit then the assessee will be entitled to deduction and if the net figure is a loss then the assessee will not be entitled to deduction. A plain reading of sub-section (3)(c) shows that "profits from such exports" has to be profits of exports of self-manufactured goods plus profits of exports of trading goods. The opening words "profit derived from such exports" together with the word "and" clearly indicate that the profits have to be calculated by counting both the exports. Deduction can be permitted under section 80HHC(1) only if there is a positive profit in the exports of both self-manufactured goods as well as trading goods. If there is a loss in either of the two, then the loss has to be taken into account for the purposes of computing the profits. On the other hand, the Section 80AB of the Act, which is also in Chapter VI-A, starting with the words "where any deduction is required to be made or allowed under any section of this Chapter" would include section 80HHC also. Further, section 80AB of the Act provides that "notwithstanding anything contained in that section". Thus section 80AB of the Act has been given an overriding effect over all other sections in Chapter VI-A. But, section 80HHC does not provide that its provisions are to prevail over section 80AB of the Act or over any other provision of the Act. Section 80HHC of the Act would thus be governed by section 80AB of the Act. [vide: IPCA Laboratory Ltd. v. Deputy Commissioner of Income-tax, 266 ITR (SC) 521].
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> 7. In this view of the matter, we are of the view that it is not correct to say that section 80HHC of the Act is a self-contained provision and section 80 AB of the Act cannot be applied to section 80 HHC of the Act. In other words, section 80AB of the Act will prevail over any other provision in Chapter VIA of the Act and

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Section 80HHC of the Act would thus be governed by section 80AB of the Act. We therefore hold that the unabsorbed business losses, unabsorbed depreciation, etc. should be taken into account while computing income for the purpose of deduction under section 80HHC of the Act. The Appellate Tribunal is not correct in holding that the unabsorbed depreciation, unabsorbed business loss and unabsorbed investment allowance of earlier years cannot be deducted before granting deduction under section 80 HHC of the Act and that the provisions of section 80AB of the Act cannot be applied while determining the business profits under section 80HHC."

4.4. To both the above decisions of this Court, viz., Asvini Cold Storage P. Ltd. v. Commissioner of Income-tax [(2007) 290 I.T.R. 183] and T.C.No.62 of 2004 (between Commissioner of Income Tax-III v. M/s.Sharon Vaneers P. Ltd.), one of us was a party (P.D.DINAKARAN, J.).

5.1. That apart, the view taken by the Bombay High Court in Commissioner of Income-tax v. Shirke Construction Equipments Ltd. [(2000) 246 I.T.R. 429 (Bom.)], which is relied upon by the assessee in the case of Asvini Cold Storage and in the case of Sharon Vaneers P. Ltd., referred supra, has now been reversed by the Apex Court in the recent decision reported in [(2007) 291 I.T.R. 380 (SC)], wherein the Apex Court has held as follows:-

".. Section 80AB of the Income-tax Act, 1961, specifying that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the purposes of the deduction under section 80 HHC.

.. In determining business profits for the deduction under section 80 HHC, the unabsorbed business losses of earlier years under section 72 should be set off."

6. Under such circumstances, since the law on the point is well settled, as fortified by the decision of the Apex Court in Commissioner of Income-tax v. Shirke Construction Equipment Ltd. [(2007) 291 I.T.R. 380 (SC)] referred supra, we answer the substantial question of law raised by the Revenue in these appeals, in the negative, in favour of the Revenue and against the assessee. The tax case appeals are, accordingly, allowed. No costs.

Sd/-
Asst. Registrar.

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Sub Asst. Registrar.

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To

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Rajaji Bhavan, Besant Nagar,
Madras.

2.The Commissioner of Income-
Tax (Appeals), Coimbatore.

3.The Deputy Commr. Of Income-tax,
Special Range-II, Coimbatore.

4. The Commissioner of Income Tax II
Coimbatore

3 ccs to Mr.N. Muralikumaran, Advocate, SR. 39966 to 39968

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